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In The
Supreme Court Of The United States
October Term, 1994

GEORGE MAYER, GREGORY TOMLIN, JOHN RAINONE, JOHN F. SCALISE, LAURIE BRETTHAUER, SEAN COONEY AND DOUGLAS ROBINSON,

Petitioners,

v.

LUIS OLIVEIRA, MILTON OLIVEIRA AND ELIAS MORIERO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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21 pp

QUESTIONS PRESENTED

1. Did the Court of Appeals properly affirm the directed verdict entered by the District Court against the petitioners on the issue of false arrest concluding that the petitioners actions toward the respondents exceeded the scope of a permissible Terry stop?

2. Did the Court of Appeals properly affirm the District Court determination that the petitioners lacked probable cause to arrest the respondents based upon a single, uncorroborated telephone call reporting a "possible burglary"?

3. Did the Court of Appeals properly conclude that the District Court did not commit error in refusing to direct a verdict in favor of the petitioners on the issue of qualified immunity?

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GEORGE MAYER, GREGORY TOMLIN, JOHN RAINONE, JOHN F. SCALISE, LAURIE BRETTHAUER, SEAN COONEY AND DOUGLAS ROBINSON,
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vs.

LUIS OLIVEIRA, MILTON OLIVEIRA AND ELIAS MORIERO,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

This brief is respectfully submitted on behalf of the Respondents in opposition to Petitioners' request that a Writ of Certiorari issue to review the Decision of the United States Court of Appeals for the Second Circuit, dated April 28, 1994. The decision of the court below affirmed the judgment of the District Court which directed a verdict against the petitioners on the issues of false arrest and probable cause in a proceeding under 42 U.S.C. §1983. However, the decision vacated the directed verdict entered by the District Court in favor of the respondents on the issue of qualified immunity and remanded the matter for a new trial on that issue.

OPINION BELOW

The opinion of the Court of Appeals is reported at 23 F.3d 642 and is reproduced at Appendix A-1 to the Petition as is the unreported Judgment of the District Court.

STATEMENT OF JURISDICTION

The Order of the Court of Appeals denying Petitioners' request for rehearing was issued on June 16, 1994, and the Petition for Writ of Certiorari was filed on September 16, 1994. Jurisdiction of this Court is sought to be invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

28 U.S.C. §1254(i) Cases in the Court of Appeals may be reviewedd by the Supreme Court by the following

methods:

(1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree... And Supreme Court Rules Involved.

Rule 10. Considerations Governing Review On Writ Of Certiorari

.1 A review of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

STATEMENT OF THE CASE

On June 5, 1991 Respondents, three black skinned men of Brazilian descent brought an action for false arrest, intimidation, excessive force, and other Constitutional violations pursuant to 42 U.S.C. §1983 against the Police Department of the City of Stamford, Connecticut and seven individual named members of said department in the United

States District Court for the Southern District of New York. On September 3, 1991, by consent of the parties, the action was transferred to the United States District Court for the District of Connecticut at Bridgeport.

The action arose on January 4, 1991 when a motorist observed Respondents driving through an affluent neighborhood of North Stamford in an older model station wagon. The motorist called 911 after seeing one Respondent hand another a video camera within the car. He reported to 911 that suspicious persons were present in this affluent neighborhood. Based upon this single uncorroborated tip, the Petitioners followed Respondents' car and ultimately formed a "V" formation behind Respondents' car as it entered Interstate 95 southbound toward New York. Respondents' vehicle was stopped and they were ordered by loudspeaker to toss out the keys and keep their hands outside the windows. With guns drawn, the police ordered the Respondents to exit the vehicle one at a time and place their hands on their heads, walk backwards toward the Petitioners and to kneel on the highway. Once kneeling, each Respondent was handcuffed, laid over the hood of a car, frisked, and placed into the rear seat of a patrol vehicle. Each Respondent was shackled, searched, hands cuffed behind his back and isolated.

Petitioners thoroughly searched Respondents' vehicle and its contents including a shoulder bag. Petitioners further interrogated each Respondent in separate police cars. At least one Respondent was read his Miranda rights. Though the Respondents were slow at times to respond to the petitioners' commands due to their limited mastery of

English, they followed the petitioners' orders without resistance.

The Respondents were actually stone masons, residing in New Rochelle, New York and had completed construction of a stone patio in the neighborhood where the motorist observed them. They used the video camera to record their completed construction project. After approximately forty minutes another police officer, dispatched to the neighborhood where the Respondents were first sighted, confirmed that Respondents' activities were legitimate. The respondents were then released without any criminal process issuing.

On June 30, 1993, the District Court granted Respondents' Motion for Directed Verdict against the Petitioners on the issue of false arrest. The District Court ruled as a matter of law that Respondents had been falsely arrested without probable cause. The District Court further ruled that reasonable police officers should have known that their actions, under the facts of this case, were not permitted by law and that Petitioners were thus not entitled to the defense of qualified immunity. Each Respondent was awarded $20,000 in compensatory damages. An additional $5,000 in punitive damages was assessed in favor of each respondent against Captain Gregory Tomlin, the ranking officer on the scene.

Petitioners' motion for judgment N.O.V., or a new trial was denied on July 27, 1993. Petitioners appealed to the United States Court of Appeals for the Second Circuit on July 30, 1993. On April 28, 1994, the Court of Appeals

for the Second Circuit, by Chief Judge Jon O. Newman affirmed in part and vacated in part the District Court's ruling and remanded the matter. The Court of Appeals concluded that the District Court correctly ruled as a matter of law that the petitioners had falsely arrested the respondents and in so doing did violate the Respondents' rights under the Fourth Amendment. Judge Mahoney dissented from this portion of the opinion, arguing that no *de facto* arrest had occurred.

The panel unanimously ruled, however, that the District Court erred in directing a verdict with respect to the defense of qualified immunity. This issue, according to the Court of Appeals, should have been submitted to the jury on the theory that a sufficient dispute existed concerning the facts giving rise to the claim of qualified immunity. The Court of Appeals reasoned that despite the earlier determination that Respondents' Fourth Amendment rights had been violated as a matter of law, a reasonable jury could conclude that reasonable police officers could believe that their actions were lawful. The Court of Appeals remanded the case to the District Court for a new trial on the issue of qualified immunity, leaving discretion to the District Court whether the jury should redetermine damages if it rejects the Petitioners' qualified immunity defense.

REASONS FOR DENYING THE WRIT

The Petition fails to satisfy the criteria set forth in Rule 10 governing review on a Writ of Certiorari. The decision of the Court of Appeals on the questions of

whether a *de facto* arrest occurred did not involve a matter of first impression that should have been decided by this Court. Furthermore, the decision is consistent with those of this Court and other Courts of Appeals which have considered and decided factually similar matters. Finally, the Court of Appeals did not " . . . so far depart[ed] from the accepted and usual course of judicial proceedings, or sanction[ed] such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

I. THE COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S GRANTING OF A DIRECTED VERDICT AGAINST PETITIONERS ON THE ISSUE OF FALSE ARREST

The Court of Appeals properly agreed with the District Court in rejecting the Petitioners' claim that respondents were merely subjected to a Terry stop, and not a full arrest. See Terry v. Ohio, 392 U.S. 1 (1968). In reaching this conclusion, the Court of Appeals applied the proper standard for determining whether or not this encounter was a Terry stop or an arrest, namely a comparison of the level of intrusiveness involved in the procedure and the corresponding justification required to reach each level of intrusiveness. Oliveira v. Mayer, 23 F.3d 642, 647 (2d Cir. 1994). See also Florida v. Royer, 460 U.S. 491, 500 (1983); Dunaway v. New York, 442 U.S. 200, 212-14 (1979).

The Court of Appeals also properly noted that whether a seizure has become an arrest depends upon the reasonableness of the intrusion in the totality of the

circumstances. Oliveira, 23 F.3d at 645 citing Posr v. Doherty, 944 F.2d 91, 98 (2d Cir. 1991). This standard is fully consistent with this Court's prior pronouncements on this issue. See United States v. Sharpe, 475 U.S. 675-682-86 (1985). Finally, the Court of Appeals correctly listed the factors to be considered in assessing whether an investigative detention has become an arrest.[1]

The Court of Appeals also enunciated the correct standard for determining if the evidence supported a directed verdict.[2] In concluding that the District Court

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[1] The Court of Appeals noted that " . . .the pertinent considerations include the amount of force used by police, the need for such force, and the extent to which the individual's freedom of movement was restrained . . . and in particular such factors as the number of agents involved . . . ;whether the target was suspected of being armed . . . ;the duration of the stop . . . ;and the physical treatment of the suspect . . .;including whether handcuffs were used. Oliveira v. Mayer, 23 F.3d at 645 citing United States v. Perea, 986 F.2d 633, 645 (2d Cir. 1993)(citations omitted). "In a section 1983 action, it would usually be a jury's task to decide whether a detention amounted to a defacto arrest since (see footnote 2)

[2] The Court of Appeals noted that "the issue of precisely when an arrest takes place is a question of fact". Oliveira, 23 F. 3d at 645. The Court of Appeals went on to note that when reviewing a directed verdict,

properly directed a verdict in favor of respondents on the false arrest issue, the Court of Appeals decision was amply supported by the undisputed facts in the record as recited above, and the case law from the other Courts of Appeal. Oliveira v. Mayer, 23 F. 3d at 646-47. (Citations omitted) Moreover, the Court of Appeals correctly noted that the Petitioners did not cite, and the Court could not find a single case in which a court found a detention with all of the intrusive elements present in this case, with little or no justification, to be a Terry stop. Id. at 646.

Nevertheless, Petitioners continue to assert that their actions amounted to no more than a permissible investigative detention, relying principally on Dempsey v. Town of Brighton, 749 F. Supp. 1215 (W.D.N.Y. 1990), aff'd. mem., 940 F.2d 648 (2d Cir.), cert. denied, 112 S.Ct. 338 (1991). Brief of Petitioners at p. 9. However, as the Court of Appeals correctly noted, the suspects in Dempsey were handcuffed only briefly, were not searched and, most importantly, the police conclusively knew that a crime had actually occurred. Oliveira v. Mayer, 23 F.3d at 646.

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as in this case, it was required to view the evidence in the light most favorable to the defendants in order to determine whether "there can be but one conclusion as to the verdict that reasonable [jurors] could have reached." Id. citing Metromedia Co. v. Fuzagy, 983 F.2d 350, 359 (2d Cir. 1992), cert. denied, 113 S. Ct. 2445 (1993). See also Brady v. Southern Railway Co., 320 U.S. 476, 479-80 (1943).

Alternatively, Petitioners rely upon the dissenting opinion of Judge Mahoney who concluded that the actions of the Petitioners amounted to nothing more than a permissible Terry stop. Oliveira, 23 F.3d at 650 (Mahoney J., dissenting.) The dissent mistakenly focused almost exclusively on the length of the detention, ignoring the other oppressive elements involved in the detention.[3] Oliveira, 23 F.3d at 650-52 (Mahoney, J., dissenting). This approach is inconsistent with the precedents established by this Court.

As this Court has noted, the mere length of a detention is not dispositive in determining if an investigative detention should be classified as an arrest. See United States v. Sharpe, 470 U.S. 675, 684-86 (1985). Rather, in the cases in which a claimed investigative detention was found to be an arrest, this Court looked to events occurring during the arrest as well as to the length of the detention. See United States v. Place, 462 U.S. 696 (1983); Florida v. Royer, 460 U.S. 491 (1983); Dunaway v.

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[3] The dissent notes that there have been cases in which individual elements such as the police drawing weapons, or the suspects being handcuffed were found to be Terry stops, and not arrests. Oliveira, 23 F.3d at 650-51 (Mahoney, J., dissenting). However, the dissent clearly overlooked the point, made by the Court of Appeals, that no one had been able to locate a single case in which a court, confronted with all the oppressive elements contained in this stop found it to be a Terry stop.

New York, 442 U.S. 200 1979). This is precisely what the Court of Appeals did in applying the totality of the circumstances test and holding that the Petitioners did indeed arrest the Respondents. That decision is consistent with this Court's prior pronouncements on this issue, and as such, no issue is presented for review.

Petitioners further contend, as did the dissent, that the stop can be justified as an investigative detention because since respondents were unable to give a plausible account of themselves to the police after they had been stopped, the length of the detention was essentially their fault. Oliveira v. Mayer, 23 F.3d at 651 (Mahoney, J., dissenting). Brief of Petitioners at p. 9 This argument again goes to the length of the detention, which as shown above, is not dispositive on the issue of whether or not an arrest occurred. Since the Court of Appeals properly looked to the totality of the circumstances involved, no error was committed and no review of that decision is warranted.

Alternatively, traditional Terry stop analysis will support the Court of Appeals decision. As this Court has noted, a dual standard is employed in evaluating the reasonableness of a Terry stop namely: "whether the officers action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the intrusion in the first place." Terry v. Ohio, 392 U.S. 1, 20 (1968). That standard applied in this case mandates a finding that an arrest occurred.

The undisputed facts show that the police possessed nothing more than an uncorroborated tip of suspicious

activity which they classified as a possible burglary. Oliveira, 23 F.3d at 644. The petitioners then employed the "felony stop" procedures described above. The Petitioners have maintained that the "felony stop" procedures employed were necessitated by the need to detain fleeing suspects and to protect themselves from persons who may be armed. See Brief of Petitioners at p. 4.

Even assuming arguendo that the initial stop of the Respondents using the "felony stop" procedures was somehow justified, any justification for the continued harsh treatment of respondents vanished shortly after the detention began. Within moments, the police had detained the vehicle and ascertained that the respondents were not armed. Having satisfied their own criteria for making the stop, there was no further justification for what followed.

However, rather than scaling back the level of intrusion, the Petitioners escalated that intrusion despite the declining justification for doing so. Those actions were not reasonably related in scope to the circumstances which justified the intrusion in the first place ", Terry, 392 U.S. at 20, and thus the detention cannot be viewed as a Terry stop. The Court of Appeals was correct in upholding the District Court determination that an arrest occurred.

II. THE COURT OF APPEALS DID NOT ERR IN AFFIRMING THE TRIAL COURT FINDING THAT RESPONDENTS WERE ARRESTED WITHOUT PROBABLE CAUSE

The decision of the Court of Appeals affirming the

finding of a lack of probable cause to arrest the Respondents was consistent with the decisions of this Court and the others Courts of Appeal. Probable cause to arrest "exists when the authorities have knowledge or reasonably trustworthy information sufficient to warrant a person reasonable caution in his belief that an offense has been committed by the person to be arrested. Illinois v. Gates, 462 U.S. 213, 241-46 (1983). Based upon the facts recited above, the Petitioners clearly lacked probable cause to arrest.

The Court of Appeals correctly noted that a single witness report of criminal activity may establish probable cause if it is sufficiently reliable and corroborated. Oliveira v. Mayer, 23 F.3d 642,647 (2d Cir. 1994), citing Alabama v. White, 496 U.S. 325, 328-31 (1990). The court then amply explained how neither the cases cited by the Petitioners, nor the facts of this particular case served to establish probable cause, justifying a directed verdict on that issue.[4]

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[4] The Court of Appeals noted that there was no eyewitness report and in fact no proof that a crime had even occurred. Oliveira, 23 F.3d at 647. The Court further pointed out that the only information the police had to go on in initiating their "felony stop" procedure was a report by a motorist that he had observed one occupant of an apparently low value vehicle holding an apparently expensive item of personal property. Id. The court also properly noted that Torchinski v. Siwinski, 942 F.2d 257, 261-62 (4th Cir. 1991), relied upon

The Petitioners, relying upon the dissent, claim the Court of Appeals ignored certain information provided by the motorist who called the police which would, in their view, establish probable cause. Brief of Petitioners, pp. 13-14 [5] However, as the dissent notes, the police were not privy to any of that information and it cannot be attributed to them. Oliveira, 23 F.3d at 652 (Mahoney, J., dissenting). The Petitioners clearly did not possess probable cause to arrest the Respondents, the decision of the Court of Appeals was correct, and no review is of that decision is mandated.

III. THE COURT OF APPEALS DID NOT ERR IN REFUSING TO DIRECT A VERDICT IN FAVOR OF PETITIONERS ON THE ISSUE OF QUALIFIED IMMUNITY

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heavily by Petitioners for the proposition that the report of a single witness may establish probable cause to arrest involved a report from the victim of a crime that had actually occurred. Oliveira, 23 F.3d at 647.

[5] Specifically, the dissent relied upon the trial testimony of Mitch Marsico who stated that his mother lived near the street respondents were first spotted on, that he had grown up in that area, that he knew of recent burglaries in the area by cars bearing New York plates, that respondents were not area residents and that their vehicle, a station wagon was not the type of vehicle he thought workmen would be using. Oliveira, 23 F.3d at 651 (Mahoney, J., dissenting).

The Court of Appeals unanimously vacated the portion of the District Court decision which granted a directed verdict against Petitioners on the issue of qualified immunity. Citing Anderson v. Creighton, 483 U.S. 635 (1987), the Appeals Court concluded that since the inquiries into objective reasonableness for lawfulness (the arrest) and qualified immunity were sufficiently distinct so as to require separate consideration, the District Court ruling on false arrest was not dispositive of the qualified immunity question. Oliveira, 23 F.3d at 649. The court then noted that there was a sufficient dispute concerning the facts giving rise to the claim that Petitioners thought they were conducting a Terry stop to require jury consideration of qualified immunity. Id. at 650.

Petitioners now complain that the Court of Appeals unduly restricted their right to qualified immunity because a future jury will have to be instructed that they unlawfully arrested the respondents. Yet, that is the logical import of Anderson, and the Court of Appeals was required to apply that standard in remanding the matter to the District Court.[6] The Respondents herein have also sought review before this Court of the Appeals Court decision, contending that no

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[6] In Anderson, this Court concluded that it was possible to state that someone could reasonably act unreasonably for purposes of qualified immunity. Anderson, 483 U.S. at 643. By that reasoning, then, there is no anomaly in the court of Appeals split decision affirming a directed verdict for false arrest and leaving open the question of qualified immunity.

genuine factual dispute existed concerning qualified immunity and seeking review of Anderson itself. However, until such time as Anderson is revisited by this Court, the Court of Appeals decision must be regarded as correct.

CONCLUSION

Accordingly, for all the foregoing reasons, Petitioner's request for a writ of certiorari should be denied.

Respectfully submitted,

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